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In The

Supreme Court of the United States

October Term, 1973

Docket No. 73-566

JOHN P. BAUER,

Petitioner-Appellant,

vs.

STATE OF NEW YORK,

Respondent-Appellee.

On Appeal from the New York State Court of Appeals

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

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TABLE OF CONTENTS

	Page
Petition	1
Opinion Below	2
Jurisdiction	2
Question Presented	3
Statement of the Case	3
Reasons for Granting the Writ	6
Conclusion	13
Appendix A - Decision of the Court of Appeals (Filed July 3, 1973)	14
Appendix B - Order of Appellate Division (Dated March 26, 1973)	15

TABLE OF CITATIONS

Cases Cited:

Arrant v. Wainwright, 468 F.2d 677	6
Barker v. Wingo, 405 U.S. 514	3, 6, 7
United States v. Perry, 353 F.S. 1235	6
United States v. Rucker, 464 F.2d 823	7

Contents

Page

Statute Cited:

28 U.S.C. Section 1257(3) 2

United States Constitution Cited:

Sixth Amendment 3, 6, 7

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No.

JOHN P. BAUER,

Petitioner-Appellant,

vs.

STATE OF NEW YORK,

Respondent-Appellee.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Petitioner prays that a Writ of Certiorari issue to review the order and judgment of the New York State Court of Appeals.

OPINION BELOW

The affirmance in the New York Court of Appeals, which was rendered without any opinion, is set forth in Appendix A to this petition. The judgment in the intermediate state appellate court (Appellate Division—First Department) was, likewise, affirmed, but in that court petitioner's sentence was reduced from a term of six months imprisonment to a term of sixty (60) days. A copy of the court's order in the Appellate Division is annexed hereto as Exhibit B to this petition.

JURISDICTION

The judgment of the New York State Court of Appeals was entered on July 3, 1973. That judgment affirmed the order of the New York State Supreme Court, Appellate Division—First Department, entered on March 26, 1973, affirming the judgment of conviction in the trial court, while reducing petitioner's jail sentence from six months to sixty (60) days.

The jurisdiction of this court is invoked under 28 U.S.C. Section 1257(3).

At the time this petition was being prepared, there was pending in the New York Court of Appeals petitioner's application to amend the remittitur in this case to state that such court did consider and pass upon petitioner's constitutional claim regarding denial of a speedy trial. This application was made during the summer recess of the New York Court of Appeals which did not reconvene until September 17, 1973. Petitioner's pro forma motion has not yet been decided (September 24, 1973).

QUESTION PRESENTED

Was the petitioner denied his right to a speedy trial under the Sixth Amendment to the United States Constitution, and in violation of this Court's holding in *Barker v. Wingo*, 407 U.S. 514, where the delay between indictment and trial was in excess of four (4) years; where petitioner had twice vainly demanded a speedy trial, and where petitioner was prejudiced by the death of his excellent and long experienced counsel during the course of the State's protracted delay?

STATEMENT OF THE CASE

Petitioner was an officer in a close corporation engaged in the business of foreign trade in foodstuffs and agricultural commodities. The gross revenues of the firm (BNS International Service Corporation) grew to over $100,000,000 by 1964. In that year, however, petitioner's father, who was the dominating corporate principal, passed away and the remaining principals became irreversibly involved in intracorporate strife. While a disengagement of interests was worked out by the attorneys for the competing factions, and an ostensible detente was set up pending physical relocation of the now legally separated parties who were forced temporarily to occupy the same quarters, the dissolution was in fact marked by continuing hostilities on both sides. These included the hiring of private detectives, first by petitioner's former associates, and then by petitioner, to guard their respective interests—more specifically, against the rifling of files and other possible instances of commercial sabotage.

Petitioner, however, had made the mistake of choosing a detective agency randomly from the Yellow Pages and wound up with a firm styled "Protective Detective Agency"—a company operated by one Harold Getting. Getting began to visit petitioner in his BNS office almost every day. His ostensible purpose was to check on the performance of the guard, Francis Kennedy. His real

purpose soon became clear. Getting began to make frequent unsolicited comments about petitioner's plight at BNS, pointedly comparing petitioner to the city of Berlin, an enclave cut-off and surrounded by enemies. And having played upon petitioner's fears and uncertainties, Getting strongly suggested that petitioner Bauer's office might be monitored by Neumann—one of Bauer's former partners, and that it should be checked out electronically. Naturally, Getting knew people who could do the job. Getting's choice was one John Broady who, unknown to petitioner, was "one of the prime wiretap artists in the country"; a professional whose previous convictions for wiretapping did not deter him from continuing his illegal activities. The other "friend" of Getting was one Walter Miller, a self-styled electronics expert who built eavesdropping devices and sold and used them in illegal eavesdropping and wiretapping operations.

By feeding Bauer a line about the complexities of wiretapping and eavesdropping, admittedly with the purpose of drumming up business and selling electronic equipment, Miller, Getting and Broady first performed a simple electronic sweep of Bauer's office which, not surprisingly, was reported to be inconclusive. Miller then installed wiretapping devices in the phones of Werner Neumann and Charles Palermo, the company comptroller, explaining that it was all part of the process of ascertaining whether Bauer was being overheard. Though Miller testified that the wiretaps were requested by Bauer to listen in on Naumann and Palermo, the jury acquitted petitioner on the counts relating to this incident.

In any event, before any conversations could be overheard, Neumann and Palermo had trouble with their phones and called in the telephone company. The telephone company discovered the devices and called in the District Attorney. The District Attorney's detectives,

who had previously seen electronic equipment made by Miller, then called in Miller. Miller confessed to installing the wiretap and agreed to work with the District Attorney who was highly interested in the activities of John Broady and Harold Getting.

Several days later, Miller, now a police agent, built a eavesdropping device and placed it in the office of Werner Neumann, though the police disconnected the battery before any conversations could be overheard. Petitioner was arrested a year and a half later (December, 1966), and more than four years later was convicted upon one count for attempted eavesdropping, as a result of Miller's installation. Though Broady and Getting, the architects of the crime, received only suspended sentences upon pleas of guilty, Bauer, after trial, was astoundingly given a term of six months in jail.[1]

1. The original indictment of December, 1966 was amended in February, 1967 by the present indictment.

REASONS FOR GRANTING THE WRIT

The crimes charged in the indictment occurred in July, 1965. Petitioner was not arrested, however, until December, 1966, a year-and-a-half later. From December, 1966, the date of the original indictment,[2] until January 20, 1971, the date of the trial,[3] the case was on the trial calendar 42 times. During this four-year period, the defense made at least two motions to dismiss the indictment on speedy trial grounds, the first occurring on February 23, 1967, the second on May 8, 1968. Yet, not even this second demand for a speedy trial produced any results for another two-and-a-half years. While a few of the adjournments were requested by petitioner because of the death of counsel in 1970, the overwhelming number of continuances were requested by the People, and in many instances were granted without the consent of the petitioner. This exorbitant delay of four years from indictment, and five and-a-half years from the events charged in the indictment, clearly denied the appellant his Sixth Amendment rights *(Barker v. Wingo*, 405 U.S. 514; *Arrant v. Wainwright*, 468 F. 2d 677; *United States v. Perry*, 353 F.S. 1235).

While the People show excuse for some of the delay attributable to pretrial procedures in which the defendants must be deemed to have acquiesced, there were nonetheless, very long periods of delay which are substantially left unexplainted in the record. Here, outside of the necessary defense delay occasioned by the death of petitioner's attorney, the repeated insistence of the petitioner on a speedy trial was constantly overriden by further prosecution efforts to adjourn the case. And no good cause appears in the record to justify the denial of a

2. The first trial was terminated by a mistrial during the voir dire. The trial below commenced five days later, on January 25, 1971.

3. The Appellate Division of the New York State Supreme Court reduced this sentence to a term of imprisonment for sixty (60) days.

speedy trial to petitioner. Consequently, the obligation of the prosecutor to move the trial promptly was not met, and petitioner was, accordingly, entitled to a dismissal of the indictment.

Counsel has procured the minutes of proceedings with respect to each adjournment. In those instances where no minutes have been procured to match an adjourned date, as shown, in the docket entries, there is no record of any minutes having been taken by any reporter on the date in question.

On February 23, 1967, petitioner was arraigned on the instant superseding indictment. Importantly, through his counsel, the late Harris Steinberg, petitioner moved immediately for a speedy trial. The prosecutor requested two weeks to answer petitioner's pre-filed motions. Despite petitioner's threshold motion for a speedy trial, the case was kept off the calendar nine (9) months. It is clear that petitioner's immediate demand for a speedy trial triggered the operation of his Sixth Amendment rights (*Barker v. Wingo*, 405 U.S. 514; *United States v. Rucker*, 464 F.2d 823).

On October 23, 1967, the case reappeared on the trial calendar, but was adjourned. Petitioner was in Europe at the time, on business, and had been excused from appearing by the prosecutor. Two other defendants were also absent and it appears that the case had been placed back on the calendar with very short notice. At all events, the prosecutor, himself, adjourned the matter for one month.

On November 20, 1967, petitioner was still in Europe on business and his counsel applied for an adjournment, which was granted, to December 5, 1967. The district attorney had excused petitioner from appearing. With two

other defendants also absent, the prosecutor told the court he was "ready".

On December 5, 1967, petitioner appeared with his counsel. All defendants were present, except the prosecutor's informant Miller, who was still, apparently, being carried as an active defendant. This procedure raises grave doubt that the prosecution was actually ready for trial. The matter was adjourned for one week, to December 12, 1967. It also appears that the defendants were excused from appearing on future adjourned dates subject to notice from the prosecutor and their attorneys.

On December 12, 1967, petitioner's case was not called. The case of John Broady (Ind. No. 4822-66) was, however, on the calendar and the proceedings relating thereto show that the prosecutor had determined to give a trial preference to this case — thus placing petitioner's matter in limbo.

On January 3, 1968, all interrelated eavesdropping cases, involving a multitude of defendants, were on the calendar. Four attorneys indicated that they were in the process of having motions related to the cases decided. Petitioner's motions, it will be remembered, had been served and filed 11 months earlier. The trial court took all motions under consideration and the matter was adjourned to January 12, 1968.

On January 12, 1968, petitioner's trial attorney, was engaged in another trial. His associate appeared and the matter was adjourned to January 23, 1968. On January 23, 1968, the case was adjourned to January 31, 1968.

Reasons for Granting the Writ

It does not appear that the case was ever placed on the calendar on January 31, 1968. Indeed, petitioner's case did not again come before a justice of the court until May 1, 1968 — some three months later! At that time, the People indicated they were ready as to John Broady. By this time, however, Broady's attorney was out of the case, having suffered a heart attack. New counsel (Maurice Edelbaum) had entered the case in early March, 1967, and had made motions on behalf of Broady. His associate appeared and asked for an adjournment to June 15, 1968, in view of Edelbaum's other stated engagements. A heated and protracted colloquy developed over this and the court itself suggested that the case be put over to September, 1968.

Interestingly, during the course of argument, the reason for extensive prosecutorial delay peaked out of the colloquy. In this connection, counsel for Broady advised the court that illegal eavesdropping had occurred on the prosecutor's part—so that a dismissal of the Broady cases had been contemplated. The court adjourned the matter to May 8, 1968, to decide finally the issue of a further adjournment for Broady - and all attorneys were directed to produce their clients on the 8th.

On May 8, 1968, the court docket — most importantly — shows that petitioner again moved to dismiss his own case by reason of failure to prosecute! On the call of the calendar, petitioner was personally present. The court commenced to discuss the varied commitments in other courts of Broady's new attorney, Mr. Edelbaum. In the light of his particular situation, the court adjourned all the cases to September 1968 Term of the court and gave the prosecutor a direction quickly to advise all attorneys of which of the 5 wiretapping cases which were involved the District Attorney intended to move first. Then — on the record itself — counsel for petitioner specifically made application to dismiss his case for failure to prosecute. The

court denied the motion, but was careful to have the application for such relief received on behalf of all defendants.

During the summer months which ensued, the prosecutor never gave notice as to which of the five (5) separate wiretapping cases he was going to move for trial. On September 3, 1968, the prosecutor told the court that he was now going to try an altogether unrelated case. Accordingly, all the wiretap cases were adjourned by the prosecutor to September 9, 1968. An additional reason urged for the adjournment by the prosecutor was that the attorney for Marie Basile (a defendant in a wiretapping case *other* than defendant's case) had died. Using that attorney's death as an excuse, the prosecutor told the court the "other cases" would also have to be adjourned. On this occasion, although neither petitioner nor his attorney was present, the prosecutor raised no complaint. The only defendant present was John Broady, a fact indicating that it was only his cases, and Mr. Edelbaum's availability to represent Broady, which was the prosecutor's concern. Mr. Edelbaum was in court.

On the next adjourned date, September 9, 1968, neither defendant nor his attorney, Harris Steinberg, Esq., were present. The prosecutor explained to the court that Mr. Steinberg had telephoned him and he had told Steinberg that he was starting the *Glucksman* case with Mr. Edelbaum ("I [Mr. Andreoli] told him [Mr. Steinberg] what the situation is"). The prosecutor then had the cases put over for two weeks.

On October 28, 1968, all the *Broady* cases were adjourned to November 18, 1968. No reason is given for this adjournment.

On November 18, 1968, the case was curtly adjourned by the court to December 4, 1968. Although the

adjournment was stated to be "on consent", neither petitioner nor his attorney were present.

No minutes of adjournments have been able to be secured for apparent adjournments which took place on December 4, 1968 and March 10, 1969. On April 18, 1969, the prosecutor was engaged in another trial and Broady's attorney was also off trying a case elsewhere. His emissary won a week's adjournment for the defendant Broady. Several of the defendants and their attorneys were absent—again illustrating the hopelessness of getting the cases started while the prosecutor and Edelbaum were probing each other out on their respective calendars and engagements.

On April 24, 1969, the conflict erupted again with the court utterly beside itself over the delay. The trial justice began to speak of the issue of "disciplinary action" and marked the case against Broady "ready" — to follow the case then on trial. Edelbaum's frustrated emissary pleaded in vain that Edelbaum had just finished a nine weeks trial with the prosecutor, Mr. Andreoli. He asked, on the record, to know which *Broady* case the prosecutor intended to move for trial. The prosecutor gave no answer to this question and the debate continued to swirl about over the availability of the busy Mr. Edelbaum. The prosecutor never stated he was ready to try petitioner Bauer.

On April 28, 29, and May 20, 1969, all the *Broady* cases were marked ready and passed. But on July 8 and July 15, 1969, all these cases were again adjourned.

On August 1, 1969, petitioner was in Europe on business and his case was adjourned to September 5, 1969. The case did not appear on the calendar, however, until September 10, 1969 and was adjourned to September 17, 1969.

Reasons for Granting the Writ

On September 17, 1969 — three years after the initial indictments — the prosecutor moved to consolidate four of the indictments against Brody only for trial. On this occasion, the prosecutor candidly remarked that it was Mr. Edelbaum's busy calendar over the preceding years which resulted:

> "in a large number of defendants being unable to go to trial."

Mr. Edelbaum noted that the prosecutor had never once informed him of which case — of the five *Broady* cases — he was going to try. He also pointed out that the prosecutor's motion to consolidate related only to Broady and that all the remaining defendants (including petitioner Bauer) would be getting separate trials. [This fact demonstrates beyond dispute Mr. Andreoli's lack of interest to try any defendant except Broady.]. The court reserved decision and the "Broady cases" were put over to September 19; and then again, to September 24, 1969.

The motion to consolidate was denied (September 24, 1969). Thereafter, the case was adjourned intermittently for another *15* months until petitioner's trial started in January 1971.

The foregoing history — assembled from the debris of endless adjournments — shows how the prosecutor utilized the engagements of Mr. Edelbaum to stall trials of the other defendants until each succumbed to the temptations of a plea — including Broady. Only Bauer — the businessman induced to utilize the services of the crafty Miller and Broady — held out for a trial, despite offers of a misdemeanor plea and a suspended sentence. Twice, at least, he vainly moved for a trial on grounds of undue delay. Ignoring these, the prosecutor utilized the excuse of not being able to nail down for trial the busy attorney who represented his real target — John Broady. It would have

been easier to grant petitioner Bauer a severance and to have proceeded to trial with him — as it was the prosecutor's duty to do. In the terrible, unconscionable, delay which developed, attorneys for two different defendants died — and one other attorney suffered a heart attack, thereby having to retire from the case.

In the end, even the prosecutor escaped having to try any one of the five *Broady* cases! When Broady's attorney finally wore the prosecutor out and won this convict-repeater Broady a suspended sentence — Andreoli lost interest in the *Bauer* case and cooly shifted it to an assistant subordinate to him. The extensive delay, however, left petitioner Bauer standing alone. For time and a dreaded illness had intervened to strike down Bauer's attorney. In a very real sense, the delay forced upon petitioner Bauer, over his repeated objections, cost him the assistance and guidance of a counsellor whose unique gifts could have supplied the slim margin necessary in this close case for a complete defense victory on all counts.

Petitioner was undeniably denied his repeatedly sought after right to a speedy trial — and those denials contributed, in a prejudicial fashion, to his conviction in this case.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

s/ Lawrence K. Feitell
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APPENDIX A—DECISION OF THE COURT OF APPEALS

(Filed July 3, 1973)

No. 328 73

The People & c.,

Respondent,

vs.

John P. Bauer,

Appellant.

Order affirmed.
No opinion.
All concur.

APPENDIX B—ORDER OF APPELLATE DIVISION

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 26, 1973.

Present—Hon. Harold Stevens, Presiding Justice,
Arthur Markewich,
Emilio Nunez,
Francis T. Murphy, Jr.,
Myles J. Lane, Justices.

The People of the State of New York,

Respondent,

-against- 6632

John P. Bauer,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Fein, J.), rendered, entered on September 27, 1971, convicting defendant after trial, upon a jury verdict, of attempted eavesdropping and sentencing him to imprisonment for a term of six months, and said appeal having been argued by Mr. Lawrence K. Feitell of counsel for the appellant, and by Mr. Hugh Anthony Levine of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the judgment so appealed from be and the same is hereby modified, in the exercise of discretion, by reducing the sentence to a term of 60 days; and as so modified, the judgment is affirmed.

Order of Appellate Division

The case is remitted to the Criminal Term, Supreme Court, New York County, for proceedings to direct defendant to surrender himself to said Court in order that execution of the judgment be commenced or resumed. (CPL 460.50, subd. 5.)

ENTER:

HYMAN W. GAMSO

Stevens, P.J., Markewich, Nunez, Murphy, Lane, JJ.

6632 The People of the State of New York

Respondent, H. A. Levine

-against-

John P. Bauer,

Defendant-Appellant. L. K. Feitell

Judgment, Supreme Court, New York County (Fein, J.), rendered September 27, 1971, convicting defendant after trial, upon a jury verdict, of attempted eavesdropping and sentencing him to imprisonment for a term of six months, unanimously modified, in the exercise of discretion, by reducing the sentence to a term of 60 days, and as so modified, the judgment is affirmed. In our opinion, under the circumstances of this case, the sentence was excessive to the extent indicated. The case is remitted to the Criminal Term, Supreme Court, New York County, for proceedings to direct defendant to surrender himself to said Court in order that execution of the judgment be commenced or resumed.(CPL 460.50, subd. 5.)

Order filed.